Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd

HIGH COURT (PENANG) — BANKRUPTCY NO 29–65–90
MOHAMED DZAIDDIN J
27 JUNE 1991

Bankruptcy *— Bankruptcy notice — Validity of notice — Judgment creditor did not deduct from judgment sum proceeds of sale of principal debtor's property — Judgment debtor failed to give notice to judgment creditor disputing validity of bankruptcy notice — Whether bankruptcy notice was valid — Bankruptcy Act 1967 s 3(2)(ii)*

Bankruptcy *— Creditor's petition — Judgment creditor did not deduct from judgment sum proceeds of sale of principal debtor's property — Judgment debt by time of hearing of petition substantially reduced — Whether court could allow petition — Bankruptcy Act 1967 ss 5(1)(a) & 6(2)*

The judgment debtor ('the debtor') was a guarantor who was sued by the judgment creditor ('the petitioner'). The petitioner obtained a judgment sum against the debtor and issued a bankruptcy notice to the debtor on 15 January 1990. The debtor did not comply with the bankruptcy notice and the petitioner filed a creditor's petition on 9 April 1990. At the hearing of the creditor's petition, the debtor alleged that the petitioner had failed to deduct the proceeds of sale of the property belonging to the principal debtor which was charged to the petitioner. The debtor, however, did not give notice to the petitioner disputing the validity of the bankruptcy notice. The petitioner asserted that the proceeds of sale of the principal debtor's property was only received by the petitioner after the creditor's petition was filed.

Held, allowing the petition:

(1) The debtor could not raise the issue of the correctness of the judgment sum as stated in the creditor's petition unless he had given notice to the petitioner under s 3(2)(ii) of the Bankruptcy Act 1967. Since the debtor was aware of the petitioner's application to sell the principal debtor's property, he ought to have set aside the bankruptcy notice. In the circumstances, the bankruptcy notice could not be invalidated by reason of the mistake as to the judgment sum.

(2) Since the sale proceeds were paid to the petitioner after the filing of the creditor's petition, the amount claimed in the bankruptcy notice remained as the amount actually due from the debtor to the petitioner at the time the creditor's petition was filed.

(3) Even where the judgment debt on which the creditor's petition was founded had by the date of hearing of the petition been substantially reduced, the court could still make a receiving order unless the judgment debt was less than the statutory minimum.

[Bahasa Malaysia summary

Penghutang penghakiman ('si penghutang') adalah penggerenti yang telah didakwa oleh pemiutang penghakiman ('pempetisyen'). Pem-

petisyen telah mendapat sejumlah wang dalam penghakiman terhadap si penghutang dan mengeluarkan suatu notis kebankrapan ditujukan kepada si penghutang pada 15 Januari 1990. Si penghutang tidak mematuhi notis kebankrapan tersebut dan pempetisyen telah memfailkan suatu petisyen pemiutang pada 9 April 1990. Pada pembicaraan petisyen pemiutang itu, si penghutang mengatakan bahawa pempetisyen telah gagal memotong hasil penjualan harta kepunyaan penghutang utama yang telah digadaikan kepada pempetisyen. Si penghutang, akan tetapi, tidak memberi notis kepada pempetisyen mempertikaikan keesahan notis kebankrapan itu. Pempetisyen menegaskan bahawa hasil penjualan harta kepunyaan penghutang utama hanya diterima oleh pempetisyen selepas petisyen pemiutang telah difailkan.

Diputuskan, membenarkan petisyen itu:

(1) Si penghutang tidak boleh menimbulkan isu kebenaran jumlah wang penghakiman seperti yang diumumkan dalam petisyen pemiutang kecuali beliau telah memberi notis kepada pempetisyen di bawah s 3(2)(ii) Akta Kebankrapan 1967. Kerana si penghutang tahu akan permohonan pempetisyen untuk menjual harta kepunyaan penghutang utama, beliau seharusnya mengetepikan notis kebankrapan itu. Dalam keadaan begitu, notis kebankrapan tidak boleh ditaksahkan sebab kesilapan akan jumlah wang penghakiman.

(2) Kerana hasil penjualan tersebut telah dibayar kepada pempetisyen selepas petisyen pemiutang difailkan, amaun yang dituntut dalam notis kebankrapan itu adalah amaun yang sebenarnya kena dibayar daripada si penghutang kepada pempetisyen pada masa petisyen pemiutang difailkan.

(3) Walaupun hutang penghakiman yang menjadi asas petisyen pemiutang telah tidak lewat dari tarikh pembicaraan petisyen itu banyak dikurangkan, mahkamah masih boleh membuat perintah penerimaan kecuali hutang penghakiman itu kurang daripada minimum statutori.]

[*Editorial Note*: The judgment debtor has appealed to the Supreme Court vide Bankruptcy Appeal No 02–246–91.]

Cases referred to

1 *Re Arunachalam, ex p Indian Overseas Bank Ltd* [1968] 1 MLJ 89 (folld)

2 *Re Patel (a debtor)* [1986] 1 All ER 522 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 3(2)(ii), 5(1)(a), 6(2)
National Land Code 1965 ss 263, 268
Bankruptcy Rules 1969 r 117

Lian Siew Ling (*Murad & Foo*) for the judgment creditor/petitioner.
Yeang Kok Kheang (*KS Choo & Co*) for the judgment debtor.

Mohamed Dzaiddin J: This petition, which is now under appeal before the Supreme Court, raises a question whether a receiving order can properly be made when the debt upon which the bankruptcy petition is founded has on the date of hearing of the petition been substantially reduced by reason of the judgment creditor receiving the proceeds of sale of the property of the principal debtor.

The facts of the case are these. The bankruptcy notice, issued out of this court on 15 January 1990, was served on the debtor by way of substituted service requiring the debtor within seven days after service to pay the bank the judgment sum amounting to $249,606.36 being the amount due and owing by the debtor as a guarantor under a final judgment in Penang High Court Civil Suit No 23–274–88. The bankruptcy notice was not complied with by the debtor and on 9 April 1990 the bank proceeded to file a creditor's petition seeking for a receiving order against the debtor as he was justly and truly indebted to the bank in the aggregate of the sum of $249,606.36 being the amount stated under the bankruptcy notice. When the petition was first heard on 31 December 1990, the debtor's counsel informed me that the debtor intended to object to the petition. On checking the file, I discovered that the debtor did not file a notice of intention to oppose the petition under r 117 of the Bankruptcy Rules 1969. However, on 13 February 1991, he filed his affidavit (encl 19) opposing this petition, the main ground being that the judgment sum as stated in the creditor's petition was incorrect as the bank had failed to deduct a sum of $181,282.50 being the proceeds of sale of the charged property belonging to the principal debtor which was auctioned under s 263 of the National Land Code 1965.

After hearing Encik Yeang on 20 May 1991, I held there was no merit in the objection and accordingly I made a receiving and adjudicating order against the debtor. My reasons are these. First, it is clear to me that the debtor cannot raise the above issue unless he has given notice to the bank under s 3(2)(ii) of the Bankruptcy Act 1967. The subsection reads as follows:

> Provided that a bankruptcy notice —
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> (i) ...
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> (ii) Shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Quite clearly, in the present case the debtor was aware about the application for an order for sale of the charged property of the principal debtor and ought to have applied to set aside the bankruptcy notice disputing the validity of the said notice. Yet it was only at the hearing of the creditor's petition on 20 May 1991 that he raised the issue about the correct amount. In the circumstances, the bankruptcy notice cannot be invalidated by

reason of the mistake as to the sum specified therein. To enforce my reason, I adopt the decision of Chang Min Tat J (as he then was) in *Re Arunachalam; ex p Indian Overseas Bank Ltd*[1] at p 90:

> On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid merely by reason of the excess.
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> Where the amount claimed in the bankruptcy notice is in excess and notice, as is referred to in the proviso to s 3(2) of the Ordinance, is given within seven days after the service of the bankruptcy notice, then the excess becomes relevant and on the authorities the bankruptcy notice is invalid, since it referred to a sum in respect of which the judgment creditor could not have issued execution: *In re Child, ex p Child* [1892] 2 QB 77. (Emphasis added.)

Secondly, based on the affidavits of Khoo Khay Seang, the bank's manager, affirmed on 8 March 1991 and 29 May 1991 respectively, I found as a fact that no money was received by the bank from the Pentadbir Tanah Daerah, Daerah Timur Laut, until after the creditor's petition was filed. The property in question, ie Lot 3741, bearing title Grant Mukim 132, Mukim 18, Daerah Timur Laut, Pulau Pinang was sold under s 263 of the National Land Code 1965 on 10 January 1990 for $183,500 when a 10% deposit was paid to the Pentadbir Tanah Daerah. The balance of the purchase price was paid on 7 April 1990 in compliance with the condition of sale which fixed the completion date to be three months after the sale. The full purchase price of $183,500 was finally paid to the bank under s 268 on 17 June 1990. Therefore, when the creditor's petition was filed on 9 April 1990 the bank had not been paid the sum of $183,500. Hence, the amount claimed in the bankruptcy notice ie $249,606.36 remained as the amount actually due from the debtor to the bank as at the time when the creditor's petition was filed.

Thirdly, in my opinion, where the judgment debt on which the bankruptcy petition is founded has, by the date of the hearing of the petition, been substantially reduced, this court can still make a receiving order unless the debt was less than the statutory minimum of $2,000 since on the true construction of s 6(2) read with s 5(1)(a) of the Act it is necessary to prove that a debt exceeding the statutory minimum of $2,000 is still due and owing to the bank at the date of the hearing of the petition (see *Re Patel (a debtor)*[2]).

Petition allowed.

Reported by Wong Kian Kheong